

Dis #01041027003001
212365

Law Offices

VUONO & GRAY, LLC

2310 Grant Building

Pittsburgh, PA 15219-2383

October 22, 2004

John A. Vuono
William A. Gray
Mark T. Vuono*
Dennis J. Kusturiss
Christine M. Dolfi
Louise R. Schrage
Susan C. Indrisano+

*Also Admitted in Florida
+Also Admitted in Maryland

Richard R. Wilson
of Counsel

Telephone
412-471-1800

Facsimile
412-471-4477

Re: STB Finance Docket No. 34599
Petition of Mid-America Locomotive & Car Repair, Inc.
for Declaratory Order

The Honorable Vernon A. Williams, Secretary
Surface Transportation Board
Mercury Building, #711
1925 K Street, N.W.
Washington, DC 20423-0001

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Office of Proceedings

OCT 27 2004

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Dear Sir:

Enclosed for filing please find the original and ten copies of a Petition For Declaratory Order submitted by Mid-America Locomotive & Car Repair, Inc. on referral from the Vanderburgh County Superior Court, Evansville, Indiana.

Also enclosed please find a check payable to the Board in the amount of the \$1,400 filing fee associated with this Petition. Copies of this Petition have been served on counsel for ISW and Pioneer Railcorp. and on the Vanderburgh County Superior Court.

Please date stamp and return a copy of this letter in the enclosed self-addressed, stamped envelope to indicate The Board's receipt of this Petition.

Very truly yours,

VUONO & GRAY, LLC

Richard R. Wilson, Esq.
Attorney for Mid-America Locomotive
& Car Repair, Inc.

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The Honorable Vernon A. Williams

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Enclosures

cc: Daniel A. LaKemper, Esq.
Christopher C. Wischer, Esq.
Marilyn R. Ratliff, Esq.
Indiana Southwestern Railroad Co.
Mid-America Locomotive & Car Repair, Inc.

212365

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34599



PETITION OF MID-AMERICA LOCOMOTIVE AND CAR REPAIR, INC.
FOR DECLARATORY ORDER

RICHARD R. WILSON, ESQ.
Counsel for Mid-America Locomotive, Inc.

Vuono & Gray, LLC
2310 Grant Building
Pittsburgh, PA 15219
(412) 471-1800
(412) 471-4477 FAX

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SURFACE
TRANSPORTATION BOARD

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34599

PETITION OF MID-AMERICA LOCOMOTIVE AND CAR REPAIR, INC.
FOR DECLARATORY ORDER

A. Procedural History

This Petition is filed by Mid-America Locomotive and Car Repair, Inc. (hereinafter "Mid-America"). Mid-America requests that the Board institute a Declaratory Order Proceeding under 5 U.S.C. §554(e), 49 U.S.C. §721 and 49 C.F.R Part 1117 pursuant to an Order issued in the Vandenburg County Superior Court on August 11, 2004 in Cause No. 82D03-0308-PL-3530 a copy which is set forth as Exhibit A. Under this Order of Court, Mid-America and Indiana Southwestern Railway Company (ISW) agreed to refer the following questions to the Surface Transportation Board in order to resolve a jurisdictional issue under 49 U.S.C. §10501(b):

1. Should a determination as to whether Plaintiff's (Mid-America) claim to a prescriptive easement or way of necessity, under state law, over real estate owned by the Defendant, a common carrier railroad, is preempted by federal law, specifically the Interstate Commerce Commission Termination Act, 49 U.S.C. §10101 *et. sec.*, be made by this Court, or is such a determination to be made by the Surface Transportation Board?
2. If the preemption issue is to be determined by this Court, what factual determinations are to be made and what legal standards are to be applied by this Court in making such a determination?

The questions arise out of a Complaint filed by Mid-America on August 15, 2003 to quiet title to an easement for an access road located on the property of ISW (Exhibit B) and adjacent to the rail line as depicted on Exhibit C. In response thereto, ISW filed a Motion to Dismiss and related pleadings asserting that the Court lacked subject matter jurisdiction over the claims made by Mid-America. In support thereof ISW asserted that the ICC Termination Act at 49 U.S.C. §10501(b) explicitly preempted state law, including state property law over railroad operating property. (Exhibit D1, D2, and D3). Although initially granting the ISW motion, the Court in its Order of August 11, 2004 granted Mid-America's Motion to Correct Errors and directed that the above questions be referred to the Surface Transportation Board for a Declaratory Order to aid in the resolution of the ISW Motion to Dismiss.

B. The Access Dispute

The dispute between the parties arises out of a series of transactions in which Evansville Terminal Company (ETC) subdivided and transferred two adjacent parcels of property, one to ISW and one to Mid-America. The property transferred ultimately to ISW is the railroad line and right of way which ISW presently operates under STB authority granted March 28, 2000 in STB Finance Docket 33859. The ISW rail line is adjacent to the parcel purchased by Mid-America in 1996 which includes the car repair buildings and rail yard track at Harwood Yard.¹ Prior to these transactions, Mid-America had been served by ETC at Harwood Yard and utilized the access road across the property of ETC to obtain ingress and egress from Allen's Lane to its car repair buildings located in Harwood Yard. (See Exhibit C)

¹ Mid-America subsequently transferred the rail yard property to Harwood Properties which entered into an operating and lease agreement with Ohio Valley Railroad Company (OVR) to provide common carrier rail service at Harwood Yard. OVR obtained acquisition and operating authority for the track facilities in Harwood Yard from the Surface Transportation Board at Finance Docket No. 344886 on September 24, 2004 over the protest of ISW.

When ETC conveyed the Harwood Yard property to Mid-America, Mid-America contends that it acquired not only the property itself but also, by necessity, a right of access from its property to Allens Lane by means of the roadway which it had always utilized adjacent to the ETC line. When ISW purchased its rail line from ETC in March 12, 2000, under Indiana law the conveyance was subject to all existing easements, rights of way and other occupancies to which ISW was on notice. Indeed, the access road which Mid-America has used over the ETC/ISW property has been utilized by Mid-America since 1986 and had been in existence and used by predecessor railroads from the 1970's. The roadway provides the only access to the Mid-America plant facilities.

As evidenced by the Verified Statement of Mr. Bruce E. Knight, Mid-America's continued business use of this roadway for access from Mid-America's plant to Allens Lane will not unreasonably interfere with or burden present or future operations by ISW of its common carrier rail facilities. State laws that do not impose unreasonable burdens on common carrier rail operations are not preempted. State of Texas DOT – Pet. For Decl. Order – Highway Const. in Tarrant Cty., Finance Docket 32589, 1995 ICC Lexis 14 (1995). Moreover, STB jurisdiction can not be used to shield a carrier from the legitimate processes of state law where there is no overriding federal interest in interstate commerce in a state condemnation or quiet title action. Modern Handcraft, Inc., 363 ICC 969, 972 (1981). Mid-America's minimal use of the access road can hardly present an "overriding federal interest" which can justify preempting this state quiet title action where use of the access road does not unreasonably interfere with ISW rail operations.

It is also well settled that the interpretation of deeds and the determination of who owns title to property are issues of state law that are outside the expertise of the Board. The Board has often directed that when disputes of this nature arise, the most appropriate

course of action is to direct the parties to state court to get the underlying property law issues resolved. Hayfield N. R.R. & Chicago & N.W. Transp., 467 U.S. 622, 634 (1984), see also Kansas City Pub. Ser. Frgt. Operation – Exempt – Abandonment, 7 ICC 2d 216, 225-226 (1990) (Issues of real property rights are within exclusive jurisdiction of the state.) cited in Central Kansas Railway, Limited Liability Company – Abandonment Exemption- In Marion and McPhearson Counties, KS, STB Docket No. AB-406(Sub No. 6X) (Decided May 3, 2001). In light of these well established principles, there is no basis for federal preemption of the state court quiet title action initiated by Mid-America especially where ISW has failed to demonstrate any actual or unreasonable interference with ISW common carrier rail operations arising from Mid-America's use of this roadway.

ISW claims that the access easement sought by Mid-America will unreasonably interfere with real estate owned by ISW "which real estate is exclusively used in its operations as a rail carrier." That factual representation however, is without merit because ISW purchased its railroad property from ETC on March 15, 2000, fourteen years after Mid-America began operations at the Harwood Yard repair shop and four years after Mid-America purchased the Harwood Yard shop and rail facilities from ETC. Thus, ISW has never exercised exclusive use of the access road to Allen's Lane and ISW took title to its right of way and track subject to Mid-America's implied easement for access to Allens Lane by virtue of ETC's subdivision of its property in its 1996 sale to Mid-America. See Indiana Restatement of Property, Easements by Implication, §§474-476.

In this case, there is no conflict between the state court's jurisdiction over actions to quiet title and the regulatory jurisdiction of the Surface Transportation Board with

respect to ISW's common carrier rail operations and facilities. As indicated in Section 476 of the Indiana Restatement of Property, under Indiana Law a court may consider all the facts and circumstances pertaining to an implied easement and can tailor an easement to protect and accommodate the interest of the servient estate owner. A court implied easement could preclude unreasonable interference with rail operations and describe procedures to be undertaken by the parties if the access road subject to the easement was needed for track construction which would preclude further use of the roadway for access purposes. An Indiana court is better able to build a record and address the detailed factual and legal issues of Indiana property law which underlie the respective rights and obligations of the parties with regard to an implied easement than is the Board. The ability of an Indian court to craft an easement that avoids unreasonable interference with rail operations dictates that Mid-America's quiet title action should not be preempted but should proceed so that the court can create a full record and fashion an appropriate remedy for the parties consistent with any advice or guidance from the Board.


If at the end of that process ISW still believes that the relief granted unreasonably interferes with its rail operations, those objections can be addressed to state appellate courts which can, in their discretion, seek further guidance from the Board regarding the relief crafted by the trial court. Cf. Maumee & Western Railroad Corporation and RMW Ventures, LLC – Petition for Declaratory Order, STB Finance Docket No. 34354 (STB served March 3, 2004). In that fashion, the administrative regulatory jurisdiction of the STB can be accommodated and integrated into the judicial decision making without infringing on the jurisdiction of Indiana courts over state property law or creating a federal property law applicable solely to common carrier railroad rights of way.

C. Conclusion

Accordingly, Mid-America requests that the STB (a) advise the Vandenburg County Superior Court that under the facts of this case, §10501(b) does not preempt the jurisdiction of a state court to determine the respective rights of the parties to a roadway easement over ISW's property and (b) provide the Court with such additional guidance as the Board deems appropriate.

Respectfully submitted,

VUONO & GRAY, LLC

By: 
Richard R. Wilson, Esq.
Mid-America Locomotive, Inc.

Dated: October 22, 2004

/35027

STATE OF INDIANA)
) IN THE VANDERBURGH SUPERIOR COURT
 COUNTY OF VANDERBURGH)
 CAUSE NO 82D03-0308-PL-3530
 MID-AMERICA LOCOMOTIVE &)
 CAR REPAIR, INC.)
 Plaintiff)
 v.) JUDGE BOWERS
)
 INDIANA SOUTHWESTERN RAILWAY)
 CO.)
 Defendant)

VANDERBURGH SUPERIOR COURT
FILED
 AUG 11 2004
Monika Abell
 CLERK

ORDER GRANTING MOTION TO CORRECT ERRORS
 (May 12, 2004)

The Plaintiff, Mid-America Locomotive and Car Repair, Inc., by counsel, having filed on March 29, 2004 its Motion to Correct Errors following this Court's March 15, 2004 Order granting the Motion to Dismiss filed on behalf of Defendant, Indiana Southwestern Railway Co., and, following response by the Defendant, reply by the Plaintiff, and a hearing upon the Motion, the Court now GRANTS the Plaintiff's Motion to Correct Errors and this Court's Order of March 15, 2004 granting the Motion to Dismiss filed on behalf of the Defendant is hereby vacated and set aside.

The Court further ORDERS that all further proceedings in this matter shall be stayed pending further action by the Surface Transportation Board and this Court hereby directs the Plaintiff, Mid-America Locomotive & Car Repair, Inc. to refer the following question(s) to the Surface Transportation Board, and to request that the Surface Transportation Board act upon this referral upon an expedited basis. The questions to be determined are as follows:

1. Should a determination as to whether the Plaintiff's claim to a prescriptive easement or way of necessity, under state law, over real estate owned by the Defendant, a *common carrier* railroad, is pre-empted by Federal Law, specifically the Interstate Commerce Commission



Termination Act, 49 USC 10101 et seq., be made by this Court, or is such a determination to be made by the Surface Transportation Board?

2. If the pre-emption issue is to be determined by this Court, what factual determinations are to be made and what legal standards are to be applied by this Court in making such a determination?

This matter is further set for a status conference on November 11, 2004 at 8:30 a.m.

SO ORDERED THIS 12th DAY OF MAY, 2004



JUDGE, VANDERBURGH SUPERIOR COURT

Distribution:

Marilyn R. Ratliff
Christopher Wischer

STATE OF INDIANA

COUNTY OF VANDERBURGH

MID-AMERICA LOCOMOTIVE
AND CAR REPAIR, INC.

Plaintiff,

vs.

INDIANA SOUTHWESTERN
RAILWAY, CO.

VANDERBURGH SUPERIOR COURT

★ FILED ★

AUG 15 2003

Assigned to:

JUDGE SCOTT E. BOWERS

IN THE VANDERBURGH SUPERIOR COURT

Marsha Abell
CLERK

CAUSE NO. 82D03-0308-PL 3530

**COMPLAINT TO ESTABLISH
AND QUIET TITLE TO EASEMENT**

Comes now the plaintiff, by counsel, and for its cause of action, alleges and says:

COUNT I

EASEMENT BY WAY OF NECESSITY

1. That plaintiff is an Indiana Corporation with its principal place of business located at 1601 Allens Lane, Evansville, Indiana.
2. That defendant is an Iowa Corporation with its principal place of business located at 1603 Allens Lane, Evansville, Indiana.
3. That prior to June 29, 1996, Evansville Terminal Company, the common grantor of plaintiff and defendant, was the owner in fee simple of a tract of land at what is now commonly known as 1601-1603 Allens Lane, Evansville, Indiana.
4. On June 29, 1996, plaintiff and Evansville Terminal Company entered into an agreement whereby plaintiff agreed to purchase the following described real estate in Vanderburgh County, Indiana, commonly known as 1601 Allens Lane, Evansville, Indiana:



Part of the Northwest Quarter and part of the Southwest Quarter of Section 12, Township 6 South, Range 11 West in Vanderburgh County, Indiana, being more particularly described as follows:

Commencing at the northwest corner of the northeast quarter of the northwest quarter of said section 12; thence along the west line of said quarter quarter section South 00 degrees 03 minutes 25 seconds East 425.67 feet to a point located 33.00 feet southwest of and perpendicular to the centerline of the mainline track, said point being the true point of beginning; thence alone a line 33.00 feet southwest of and perpendicular to the mainline track South 25 degrees 14 minutes 00 seconds East 2425.73 feet to a point on the south line of the southeast quarter of the northwest quarter of said section 12; thence continue along a line 33.00 feet southwest of and perpendicular to the mainline track South 25 degrees 14 minutes 00 seconds East 379.50 feet; thence North 33 degrees 26 minutes 15 seconds West 409.72 feet to a point on the south line of the southeast quarter of the northwest quarter of said section 12; thence along said south line South 88 degrees 46 minutes 00 seconds West 127.56 feet to a point located 208.00 feet southwest of and perpendicular to the centerline of the mainline track said point also being the eastern most corner of Kauai Industrial Park recorded in Plat Book "K", page 166 in the office of the Recorder of Vanderburgh County, Indiana; thence along a line 208.00 feet southwest of and perpendicular to the centerline of the mainline track and also along the eastern most line of said Kauai Industrial Park, North 25 degrees 14 minutes 00 seconds West 1575.95 feet to the northeast corner of said Kauai Industrial Park; thence along the north line of said Kauai Industrial Park South 88 degrees 46 minutes 00 seconds West 170.02 feet to a point on the west line of the northeast quarter of the northwest quarter of said section 12; thence along said west line North 00 degrees 03 minutes 25 seconds West 776.48 feet to the true point of beginning and containing a Gross Area of 9.808 acres.

5. That thereafter, Evansville Terminal Company conveyed to Evansville Terminal Railway a parcel of real estate contiguous to that conveyed to the plaintiff and described above, which parcel is commonly known as 1603 Allens Lane, Evansville, Indiana.

6. That thereafter, said parcel of real estate was conveyed from Evansville Terminal Railway to the defendant.

7. That the property which is the subject of the purchase contract signed by the plaintiff has no access to any public thoroughfare except over the property of the defendant or of strangers to plaintiff's title. Neither at the time of the sale to the plaintiff or any time since has there been any practicable means of reaching plaintiff's business from any public thoroughfare except through the land conveyed to the defendant.

8. That since the conveyance from the common grantor to the defendant, the common grantor and all successors in title, including plaintiff, have used an existing roadway over the land conveyed to the defendant for access from plaintiff's business to the public thoroughfare of Allens Lane.

9. That the existing roadway over the defendant's property is more particularly described as follows:

Part of the Northeast Quarter of the Southwest Quarter of Section 12, Township 6 South, Range 11 West in Center Township, Vanderburgh County, Indiana, being more particularly described as follows:

Commencing at the southeast corner of said quarter section; thence along the east line thereof, North 00 degrees 20 minutes 30 seconds East 2005.37 feet to the point of beginning, said point being on the existing southwest railroad right-of-way (66 foot total right-of-way - 33 feet each side of mainline); thence along the southwest line thereof, North 25 degrees 14 minutes 00 seconds West 205.77 feet; thence South 29 degrees 58 minutes 45 seconds East 44.02 feet; thence South 26 degrees 02 minutes 56 seconds East 96.92 feet; thence South 20 degrees 48 minutes 56 seconds East 65.18 feet to the point of beginning containing 663 square feet (0.02 acres).

And

Part of the Northwest Quarter of the Southeast Quarter of Section 12, Township 6 South, Range 11 West in Center township, Vanderburgh County, Indiana, being more particularly described as follows:

Commencing at the southwest corner of said quarter section; thence along the west line thereof, North 00 degrees 20 minutes 30 seconds East 1962.87 feet to the point of beginning; thence continuing along the west line thereof, North 00 degrees 20 minutes, 30 seconds East 42.50 feet to a point on the existing southwest railroad right-of-way (66 foot total right-of-way - 33 feet each side of mainline), said point also being a corner of a tract of land conveyed to the Evansville Indiana Waterworks Dept. recorded in Deed Book 470, page 171, in the office of the Recorder of Vanderburgh County, Indiana; thence South 20 degrees 48 minutes 56 seconds East 34.39 feet; thence South 17 degrees 23 minutes 50 seconds East 64.80 feet; thence South 14 degrees 01 minutes 53 seconds East 91.69 feet; thence South 21 degrees 43 minutes 39 seconds East 47.44 feet; thence South 37 degrees 29 minutes 59 seconds East 123.52 feet; thence South 33 degrees 56 minutes 23 seconds East 9.90 feet to a point on the north line of a tract of land conveyed to Dyke Howell, Robert B. Kemper and Daniel McFadden, recorded in Deed Volume 658, page 554, in said office of the Recorder; thence along the north line thereof, South 89 degrees 13 minutes 25 seconds West 17.95 feet; thence North 37 degrees 29 minutes 59 seconds West 124.75 feet; thence North 21 degrees 43 minutes 39 seconds West 50.52 feet; thence North 14 degrees 01 minutes 53 seconds West 92.26 feet; thence North 17 degrees 23 minutes 50 seconds West 58.21 feet to the point of beginning containing 5237 square feet (0.12 acres).

And

Part of the West Half of the Southeast Quarter of Section 12, Township 6 South, Range 11 West in Center Township, Vanderburgh County, Indiana, being more particularly described as follows:

Commencing at the southwest corner of said quarter section; thence along the south line thereof, North 88 degrees 31 minutes 01 seconds East 931.64 feet to the point of beginning, said point

being on the existing southwest railroad right-of-way (66 foot total right-of-way - 33 feet each side of mainline); thence along the southwest line thereof, North 25 degrees 29 minutes 29 seconds West 102.75 feet; thence North 21 degrees 37 minutes 01 seconds West 192.32 feet; thence North 23 degrees 40 minutes 49 seconds West 182.40 feet; thence North 24 degrees 41 minutes 41 seconds West 644.56 feet; thence North 25 degrees 32 minutes 45 seconds West 352.55 feet; thence North 26 degrees 41 minutes 26 seconds West 197.46 feet; thence North 33 degrees 56 minutes 23 seconds West 18.21 feet to a point on said existing southwest railroad right-of-way; thence along said existing right-of-way, North 25 degrees 14 minutes 00 seconds West 99.25 feet; thence South 33 degrees 56 minutes 23 seconds East 117.08 feet; thence South 26 degrees 41 minutes 26 seconds East 198.75 feet; thence South 25 degrees 32 minutes 45 seconds East 352.81 feet; thence South 24 degrees 41 minutes 41 seconds East 644.80 feet; thence South 23 degrees 40 minutes 49 seconds East 182.80 feet; thence South 21 degrees 37 minutes 01 seconds East 192.09 feet; thence parallel with said southwest railroad right-of-way, South 25 degrees 29 minutes 29 seconds East 108.92 feet to a point on said south quarter section line; thence along the south line thereof, South 89 degrees 31 minutes 01 seconds West 16.42 feet to the point of beginning containing 26,158 square feet (0.60 acres).

Subject to 20 feet off the south line for Allens Lane Road right-of-way per Comm. Rec. H, Page 338.

Subject to all easements and rights-of-way of record.

10. That in order that the plaintiff have access to a public thoroughfare so as to make the property occupied by it useful and productive, it is necessary that the existence and location of the easement be judicially determined.

WHEREFORE, plaintiff prays judgment: 1) determining and declaring plaintiff to have an easement by way of necessity appurtenant to the above-described real property and over that property of the defendant, said easement being that described above, and 2) for all other just and proper relief.

COUNT II

EASEMENT OF PRESCRIPTION

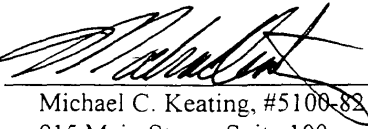
11. That plaintiff would incorporate by reference rhetorical paragraphs 1 through 10 of its complaint.

12. Plaintiff and its predecessors in title have continuously used the roadway described above for a period in excess of twenty years.

13. That the use of said roadway by plaintiff and its predecessors in title has been actual, hostile, open, notorious, uninterrupted, adverse, under claim of right or with knowledge and acquiescence of the owner.

WHEREFORE, the plaintiff prays judgment 1) determining and declaring plaintiff to have an easement by prescription appurtenant to the above-described real property and over that property of the defendant, said easement being that described above, and 2) for all other just and proper relief.

KEATING, BUMB, VOWELS, LAPLANTE
& KENT, P.C.

By: 
Michael C. Keating, #5100-83
915 Main Street, Suite 100
Post Office Box 3326
Evansville, Indiana 47732-3326
Telephone: (812) 421-1911

ATTORNEYS FOR PLAINTIFF

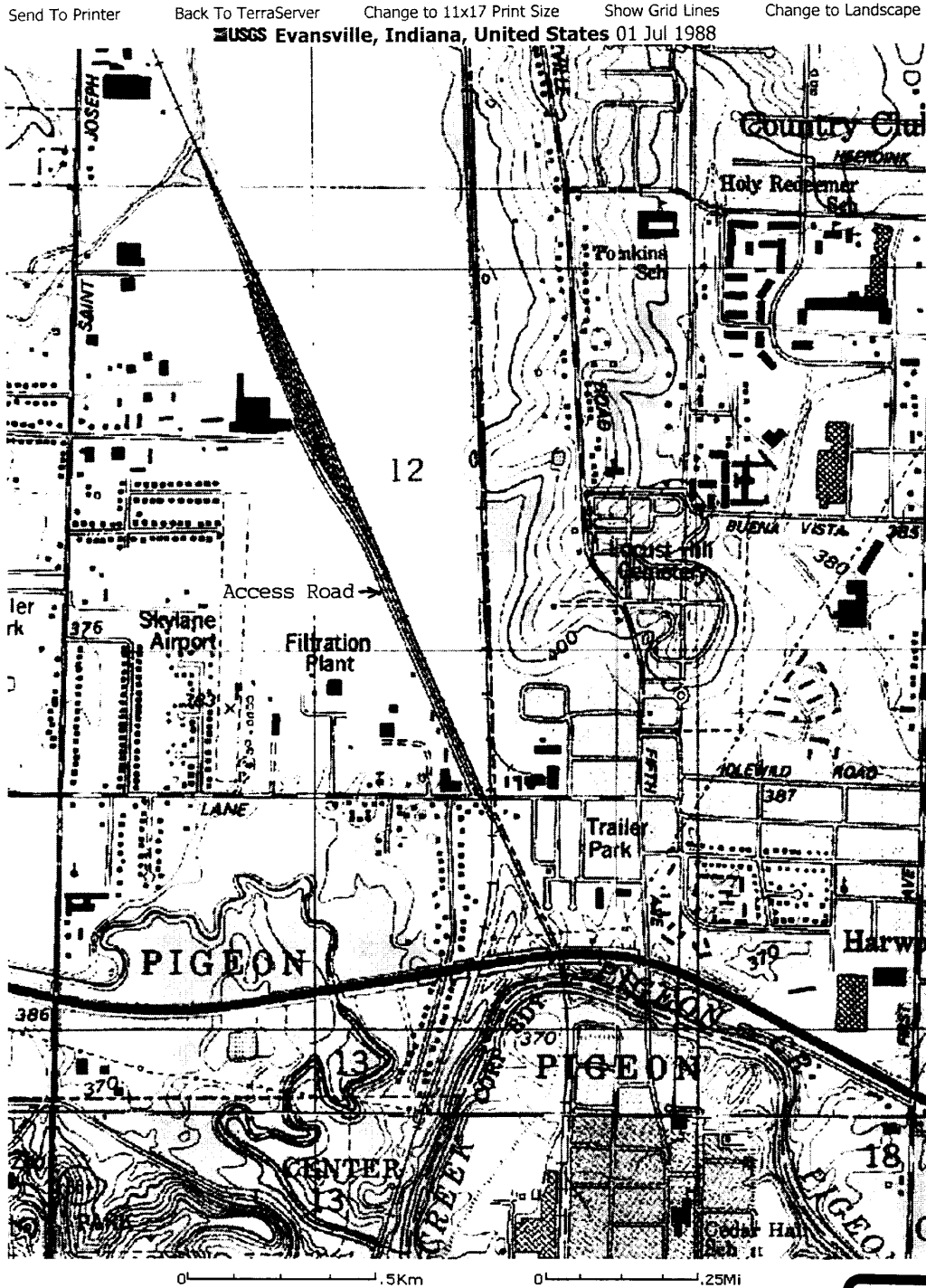


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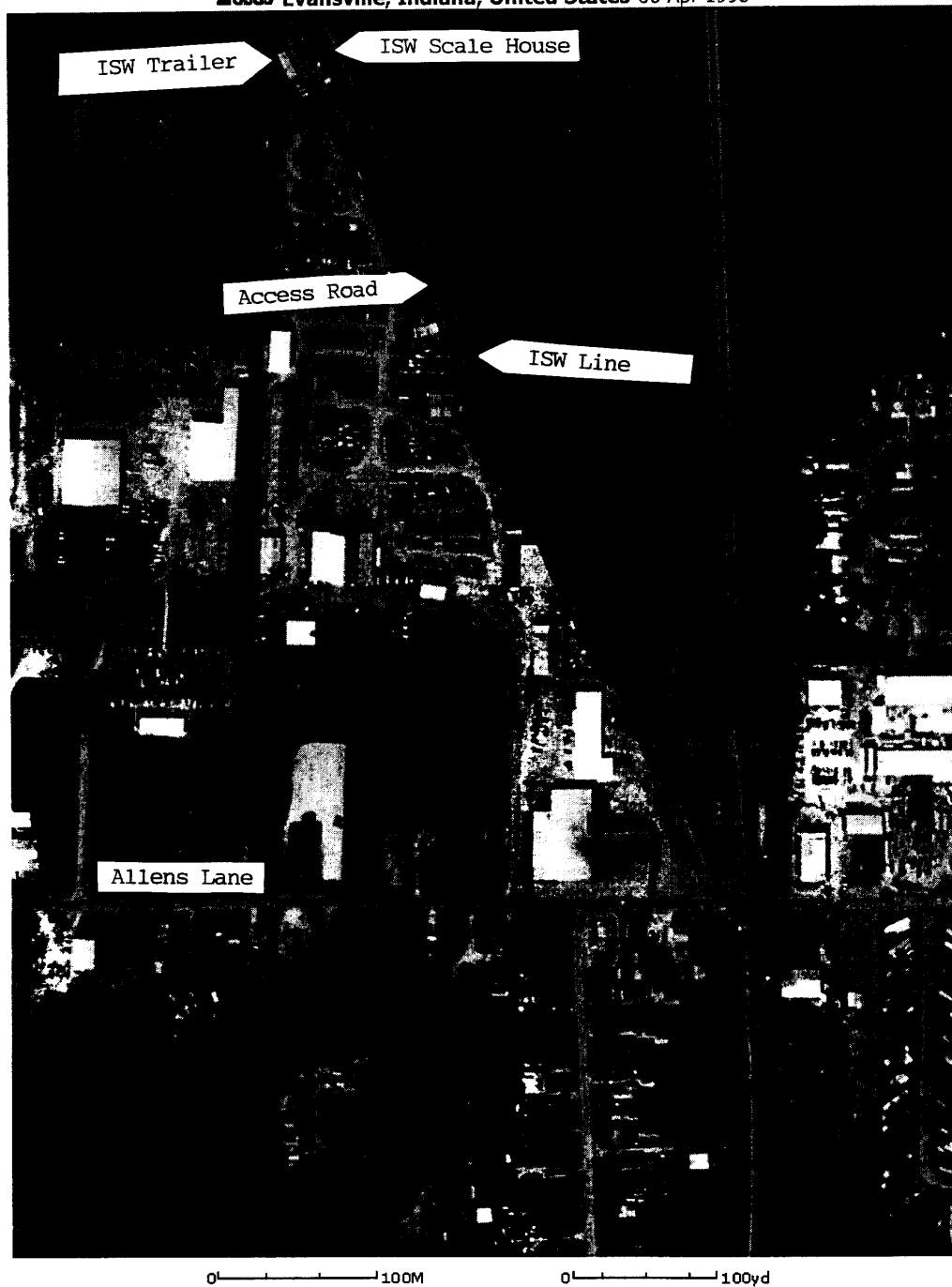


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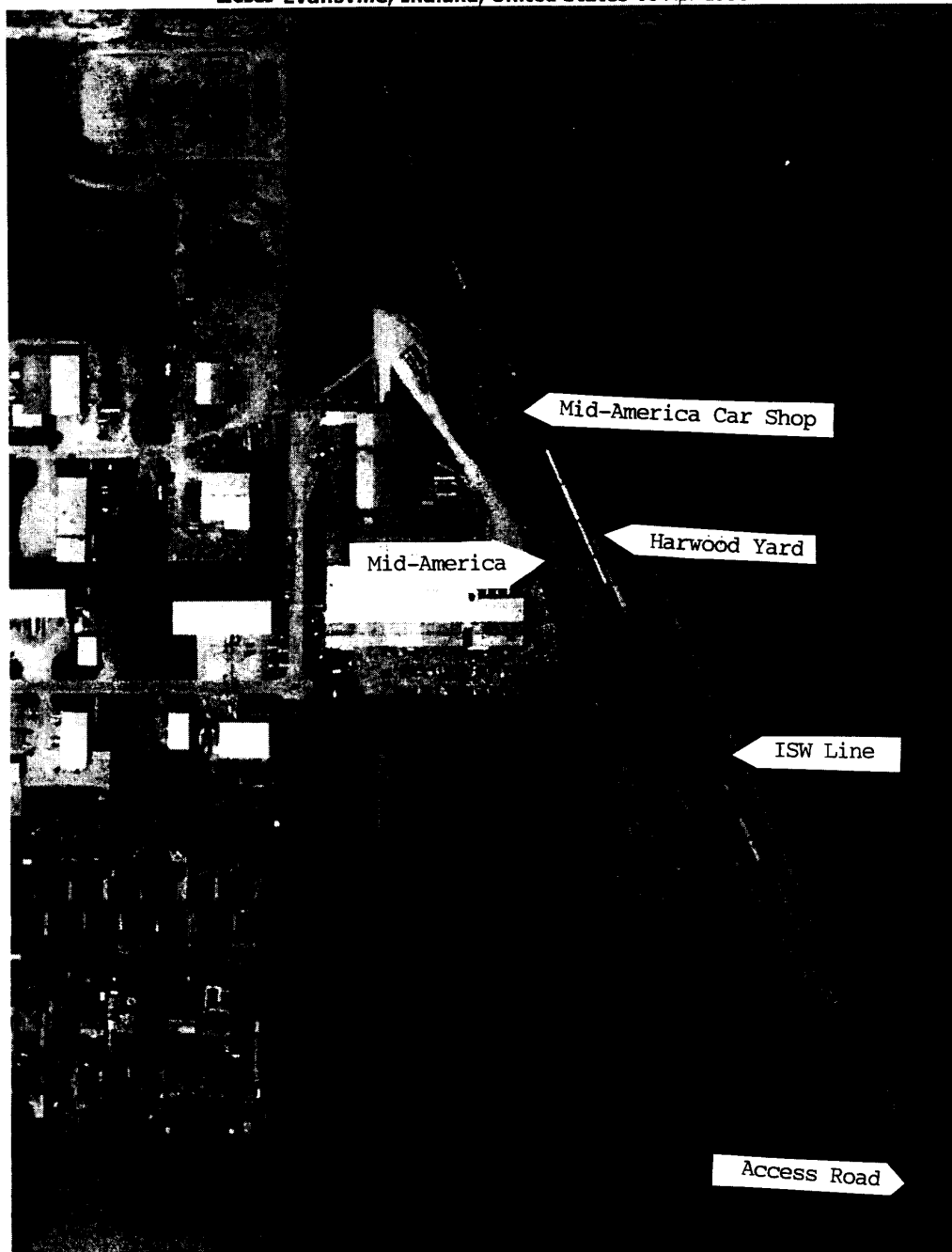
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STATE OF INDIANA
COUNTY OF VANDERBURGH

SS:

IN THE VANDERBURGH SUPERIOR COURT

MID-AMERICA LOCOMOTIVE AND CAR REPAIR,
INC.,

Plaintiff,

v.

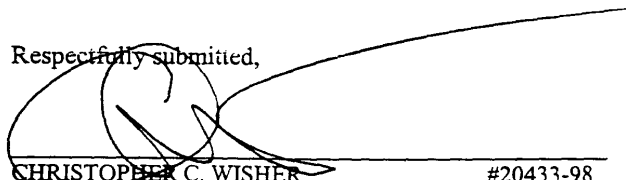
INDIANA SOUTHWESTERN RAILWAY, CO.,
Defendant.

CAUSE NO.82D03-0308-PL-3530

MOTION TO DISMISS

Comes now the defendant, Indiana Southwestern Railway, Co., by counsel, Christopher C. Wischer of the law firm of Bamberger, Foreman, Oswald and Hahn, LLP, and moves the Court for an order pursuant to Indiana T.R. 12(B)(2) dismissing plaintiff's complaint on the basis that this Court lacks subject-matter jurisdiction over the claims made therein. In support of this motion, the defendant sets out the specific grounds substantiating dismissal in its Memorandum in support of defendant's motion to dismiss, which is filed contemporaneously herewith.

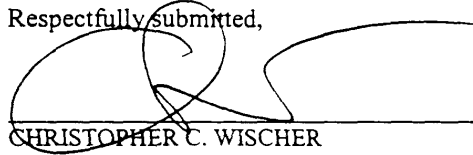
Respectfully submitted,


CHRISTOPHER C. WISHER #20433-98
BAMBERGER, FOREMAN, OSWALD AND HAHN, LLP
P.O. Box 657
Evansville IN 47704-0657
Telephone: 812-425-1591
ATTORNEYS FOR FIFTH THIRD BANK, INDIANA
cwischer@bamberger.com

EXHIBIT

D1

Respectfully submitted,

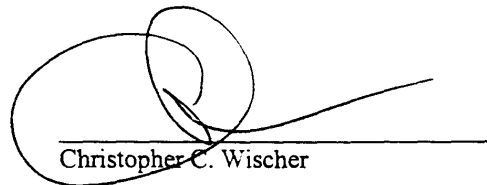


CHRISTOPHER C. WISCHER IN # 20433-98
BAMBERGER, FOREMAN, OSWALD AND HAHN, LLP
20 N.W. 4th Street, 7th Floor Hulman Building
P. O. Box 657
Evansville, IN 47704-0657
Ph: (812) 425-1591
Fax: (812) 421-4936
cwischer@bamberger.com
ATTORNEY FOR DEFENDANT, INDIANA SOUTHWESTERN
RAILWAY, CO.

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of October, 2003, mailed a true and correct copy of the above and foregoing by depositing the same in the United States Post Office at Evansville, Indiana, in a stamped, addressed envelope to:

Michael C. Keating
Attorney at Law
915 Main St., Suite 100
P. O. Box 3326
Evansville, IN 47732



Christopher C. Wischer

STATE OF INDIANA

COUNTY OF VANDERBURGH

SS:

IN THE VANDERBURGH SUPERIOR COURT

MID-AMERICA LOCOMOTIVE AND CAR REPAIR.
INC.,

Plaintiff,

VS.

INDIANA SOUTHWESTERN RAILWAY, CO.,
Defendant.

CAUSE NO. 83D03-0308-PL-3530

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

The Plaintiff in this case seeks to compel an easement over railroad operating property owned by the Defendant, Indiana Southwestern Railway Co., a common carrier railroad. Such an action cannot be maintained. Congress, in the exercise of its power to regulate interstate commerce, explicitly preempted state law, including state property law, over railroad operating property in the Interstate Commerce Act (See, 49 U.S.C. §10501(b)). Accordingly, this action must be dismissed for want of jurisdiction pursuant to T.R. 12(B)(2).

STATEMENT OF FACTS

Defendant, Indiana Southwestern Railway Co. ("ISW") is a railroad, authorized and required by the Surface Transportation Board of the United States of America to conduct common carrier rail operations as part of the national railroad system (See STB Finance Docket No. FD- 33859, served March 21, 2000).

The property in question is part of ISW's interchange yard facility in Evansville, Indiana, where ISW physically interchanges cars with CSX Transportation, Inc.

Plaintiff is a non-railroad entity operating a parcel adjacent to ISW's yard. Plaintiff is asking this Court to impose an easement across operating railroad property under the state law theories of necessity and prescription.

ARGUMENT

The Interstate Commerce Act, as amended (49 U.S.C. §10101, et. seq., "ICA") broadly covers all areas of railroad regulation, including facilities and operation. The Act, at Section 10501(b) grants the Surface Transportation Board "exclusive" jurisdiction over railroad "facilities", including the "acquisition, operation," etc. of "spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state." State law is explicitly preempted.

The Courts have, on numerous occasions, held that state property law does not apply to railroad operating property. In *City of Des Moines v. Chicago & North Western Railway Company*, 159 F.Supp. 223 (S.D. Ia. 1958), the U.S. District Court for the Southern District of Iowa held that the City could not force the Railroad to stop using a track which it operated in a City street, in accordance with a right-of-way easement granted by the City. The Court dismissed the City's action for lack of jurisdiction, based upon federal preemption. More recently, the United States District Court for the Western District of Wisconsin specifically held in *Wisconsin Central, Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009 (WD. Wis. 2000), that state condemnation law was preempted as to railroad property, to wit: "Wisconsin's condemnation law, Chapter 32 of the Wisconsin Statutes, as applied to WCL's [Wisconsin Central Ltd.] passing track in Marshfield, Wisconsin is without effect." *Id.* at 1015.

Likewise, the Supreme Court of Vermont has held that state property law is preempted by the Interstate Commerce Act (See *The Trustees of the Diocese of Vermont v. State of Vermont*,

496 A.2d. 151 (Vt. 1985)). The case is a succinct statement of the current state of the law as to federal jurisdiction. In that case the Plaintiffs claimed that the defendants had abandoned their interest in the right of way and that, under Vermont law, title to the land reverted to the plaintiffs. The Vermont Railroad (a lessee of the State and one of the defendants) had "removed all of its railroad equipment, including all switches, bridges and tracks, from the land" in question. *Trustees* at 152. The defendant City of Burlington used part of the land for a bicycle path. The Vermont Railway, however, had neither sought, nor received, permission from the Interstate Commerce Commission (predecessor of the Surface Transportation Board) to abandon railroad operations over the land.

The defendants argued "that because there has been no authorization from the ICC for them to abandon or discontinue service on any part of the railroad line, the railway is still under ICC jurisdiction," and "Consequently, the defendants argue, any order by the state courts declaring an abandonment, and granting plaintiffs the relief they seek, would usurp the ICC of its authority in this area and, therefore, would be unconstitutional," *Id* at 153.

The City of Burlington moved to dismiss the action for lack of subject matter jurisdiction. "The City alleged that Vermont Railway is subject to the ICC's exclusive jurisdiction with regard to its use of the land in question, and that consequently, the court does not have jurisdiction," *Id.* at 152. The Chittenden County Superior Court dismissed the action and the Supreme Court of Vermont affirmed.

The Court summarized the relevant law as follows: "State laws which 'interfere with, or are contrary to the laws of Congress' are invalidated by the Supremacy Clause of the United States Constitution. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824); U.S. Const. art. VI. When Congress chooses to legislate, pursuant to its constitutional powers, courts must find that

local laws have been preempted by federal regulation if they 'stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), quoted in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981)," *Id.* at 153.

The Court then found that "Vermont Railway is currently licensed and expressly authorized, by order of the ICC, to operate a railroad line on the land in question," and that the "action here is an attempt to enforce an alleged common law right, which in this instance would interfere with the laws of Congress. The action thus cannot be sustained," *Id.* at 154.

The preemption doctrine extends to state and local property regulation, as well. The United States District Court for the District of Minnesota held in *Soo Line Railroad Company v. City of Minneapolis*, 38 F.Supp.2d 1096 (D. Minn. 1998) that the City's historic preservation ordinances could not be applied to prevent the demolition of railroad buildings.

The legislative history of the Interstate Commerce Act, as well as the plain language of the statute, evidences a clear intent by Congress to preempt all areas of railroad regulation. The United States Supreme Court observed in *Chicago & North Western Transportation Company v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981), at 318, that "The Interstate Commerce Act is among the most pervasive and comprehensive of federal regulatory schemes....we have frequently invalidated attempts by the States to impose on common carriers obligations that are plainly inconsistent with the plenary authority of the Interstate Commerce Commission or with congressional policy as reflected in the Act." The Court went on to quote from *Missouri Pacific Railroad Co. v. Stroud*, 267 U.S. 404, 408 (1925), that there "'can be no divided authority over interstate commerce and...the acts of Congress on that subject are supreme and exclusive,'" *Id.* "It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory

authority over railroad operations," *CSX Transportation, Inc. v. Georgia Public Service Comm'n.* 944 F.Supp. 1573, 1581 (N.D. Ga. 1996). The Court in *Wisconsin Central, Ltd. v. City of Marshfield* made it clear that "condemnation is regulation," *Id.* at 1013. "In using state law to condemn the track defendant is exercising control -- the most extreme type of control -- over rail transportation as it is defined in [49 U.S.C.] Section 10102(9)," *Id.* at 1013. "Limiting preemption to state laws aimed specifically at railroad regulation would arbitrarily limit the purposefully broad language chosen by Congress in the ICCTA [Interstate Commerce Commission Termination Act of 1996 amendments to the Interstate Commerce Act]," *Id.* at 1013. Congress clearly did not intend to preempt state condemnation law, adverse possession law, and historic preservation law, to name but a few, and not preempt state prescriptive easement law. Such a position is untenable.

CONCLUSION

If cities and states cannot condemn or otherwise regulate railroad operating property, what rational basis is there for a private party to argue that it can impose an easement. There is none. If a private litigant filed to impose an access easement over an interstate highway, his or her claim would be summarily dismissed. For purposes of this motion, a railroad line is no different than an interstate highway. It is a federally regulated instrumentality of interstate commerce. State property laws have been wholly preempted as to railroad operating property. To argue for the imposition of an access easement is contrary to the expressed intent of Congress and well-established judicial precedent. This case should be dismissed for want of jurisdiction pursuant to T.R. 12(B)(2).

STATE OF INDIANA)
) SS:
COUNTY OF VANDERBURGH)
)
MID-AMERICA LOCOMOTIVE AND) IN THE VANDERBURGH SUPERIOR COURT
CAR REPAIR,)
)
) PLAINTIFF,)
)
v.) CAUSE NO. 82DO3-0308-PL-3530
)
)
INDIANA SOUTHWESTERN) Assigned to: The Honorable Scott Bowers
RAILWAY COMPANY,)
)
)
DEFENDANT.)

**STATEMENT IN OPPOSITION TO PLAINTIFF'S
MOTION TO CORRECT ERRORS**

Comes now the Defendant, Indiana Southwestern Railway, Co. ("ISW"), by counsel, Bamberger, Foreman, Oswald and Hahn, LLP, and hereby submits its Statement in Opposition to the Motion to Correct Errors filed by the Plaintiff, Mid-America Locomotive & Car Repair, Inc. ("MALC"). ISW simultaneously has filed the Affidavit of Daniel A. LaKemper, general counsel of ISW, in support of its Statement in Opposition.

I. Introduction

On March 29, 2004, MALC filed its Motion to Correct Errors with this Court, asserting that this Court erred in dismissing MALC's Complaint. In its Motion, MALC asserts two errors. MALC's first asserts that the Court's decision is contrary to law, arguing that the federal pre-emption provision contained in 49 U.S.C. § 10501(b) does not extend to this action. MALC's also asserts that ISW failed to meet its burden of proof and the Court lacked sufficient evidence to dismiss the case for lack of subject matter jurisdiction. Each of MALC's assertions of error is without merit.

**II. MALC's State Law Claim, If Successful, Would Interfere With ISW's Operations, and
Is, Therefore, Preempted by Federal Law.**



Under the Interstate Commerce Commission Termination Act ("ICCTA"), found at 49 USC § 10101 et seq., the Surface Transportation Board ("STB") has exclusive jurisdiction over claims related to a rail carrier's operation of its railroad facilities. Specifically, 49 U.S.C. § 10501(b) provides as follows:

The jurisdiction of the Board over –

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(Emphasis added).

Federal Courts examining the ICCTA have repeatedly commented on its breadth in preempting state law. "It is difficult to imagine a broader statement of Congress' attempt to preempt regulation over railroad operations," *CSX Transportation, Inc. v. Georgia Public Serv. Comm'n*, 944 F.Supp. at 1573, 1581 (U.S. Dist., 1996). Put simply, any state regulation or claim that interferes with or frustrates railroad operations is completely preempted by the ICCTA, and the STB has exclusive jurisdiction over such claims.

MALC contends that its claims, if successful, will not interfere with ISW's operation of its railroad facilities. However, a review of MALC's claims as they pertain to ISW's property and ISW's railroad operations reveals that MALC's claims will have a substantial impact on such operations. MALC claims entitlement to an easement, pursuant to the state law doctrines of prescription and/or necessity, over a certain gravel road located on real estate owned by ISW,

which real estate is exclusively used in its operations as a rail carrier. (See Affidavit of Daniel LaKemper).

The ISW property over which MALC seeks an easement is shown on the drawing that was attached as Exhibit "A" to the Affidavit in Opposition to Motion to Dismiss submitted by MALC. As shown by the drawing, ISW's property consists of a 66 foot strip of land containing a railway line and a service road. The railway line generally runs at or near the center of the 66 foot strip of land. The service road is approximately 15 feet wide and runs along side the railroad track for the entire length of the ISW property. It is over this roadway that MALC seeks an easement.

If successful, MALC would obtain a right of ingress and egress that would permit it, its employees, customers, and suppliers, as well as its successors and assigns, the perpetual and absolute right to come and go over ISW's roadway. Contrary to the position taken by MALC, such an easement over the roadway would absolutely interfere with ISW's operation of the railroad facilities located on its property. The segment of the subject roadway over which the easement is sought is over 2,000 feet long and runs within mere feet of the main track located on the ISW property. If MALC were to have a perpetual access easement over the roadway, ISW would be required by law to operate its facility in such a way as to not interfere with MALC's right of ingress and egress over the roadway. *Cleveland, C., C. & S. L. R. Co. v. Smith*, 177 Ind. 524 (Ind., 1912); *Panhandle E. Pipe Line Co. v. Tishner*, 699 N.e.2d 731-739 (Ind. App., 1998). No longer would ISW have the absolute right to control its entire 66 foot right-of-way, which control is necessary to insure the proper track maintenance, drainage, site distance, security and general safety. (See Affidavit of Daniel LaKemper) In addition, ISW would forever be precluded from constructing additional railroad tracts on the property now occupied by the

roadway. See *City of Auburn v. STB*, 154 F3d 1025 (9th Cir. 1998), cert. Denied, 119 Sct. 2367 (1999), where the Ninth Circuit United States Court of Appeals upheld an STB decision finding state and local regulations were preempted because they would delay or deny the carrier the right to future construction of railroad facilities.

Furthermore, MALC takes the position that the roadway does not interfere with the railroad track itself and, therefore, cannot be said to interfere with ISW's railroad operations. MALC's position in this regard ignores the fact that a roadway owned by a railroad is by definition a part of the railroad's facilities. The ICCTA, more specifically 49 USC § 10102(6) ("Definitions"), defines "railroad" as follows:

(6) "railroad" includes—

- (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
- (B) the road used by a rail carrier and owned by it or operated under an agreement; and
- (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

(Emphasis added). Moreover, a finding that the doctrine of federal preemption is limited to the area actually occupied by the tracks themselves would contradict over a century of Federal jurisprudence, which has long held that a railroad is entitled to its entire right of way, not just that portion occupied by the railroad tracks. "The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident." *New Mexico v. United States Trust Co.*, 172 U.S. 171, 185 (U.S. 1898); see also *Northern P. R. Co. v. Smith*, 171 U.S. 260 (U.S. 1898).

MALC's reliance upon the STB's decision in Maumee & Western Railroad Corporation and RMW Ventures, LLC – Petition for Declaratory Order, STB Finance Docket No. 34354 (STB served March 3, 2004) is also misguided. First, in Maumee, the STB made no decision as

to whether preemption was applicable. The STB simply refused to intervene and referred the case back to state court, stating that the state court was "well-suited" to determine whether the proposed local regulation would "impermissibly interfere with railroad operations." Thus, the Maumee decision supports this Court's ability to decide the issue of federal presumption, which this Court has correctly done.

Second, Maumee dealt with a city's proposed condemnation of an easement for an at-grade road and underground utility crossing. Certainly an easement crossing a railroad at a specific ascertainable point is not as pervasive as a lengthy roadway running within feet of the track itself and possibly at times encroaching on its roadbed. Furthermore, even when discussing the impact of such crossings, the STB was careful to qualify its statements, stating for example:

Thus, acquisition of an easement by eminent domain to permit crossing a railroad track in connection with construction of a new public street would not implicate the Federal Preemption of 49 U.S.C. § 10501(b) unless it would prevent or unreasonably interfere with railroad operations.

Rather, routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer crossings, etc., are not preempted, so long as they would not impede rail operations or pose undo safety risks.

Stated simply, the easement claimed by MALC would place limitations on ISW's use of its railroad facilities, which limitations do not exist in the absence of such claims. Clearly then, the claims made by MALC must be found to interfere with ISW's railroad operations and, therefore, are preempted by the ICCTA.

III. The Court's Decision Was Supported By Evidence In The Record.

Although MALC correctly points out that ISW carried the burden of proof with respect to its Motion to Dismiss for lack of subject matter jurisdiction, the Court's review of ISW's Motion was not limited to evidence presented by ISW. "In ruling on a Motion to Dismiss for a lack of

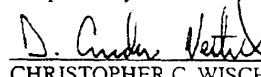
subject matter jurisdiction, the court is empowered to resolve factual issues. The court has considerable latitude in devising procedures to ferret out the facts pertinent to jurisdiction, and it is well established that in doing so it may consider not only the complaint but any Affidavits or evidence submitted." *Linda Sons v. The City of Crown Point*, 691 N.E.2d 1237, 1239 (Ind. Ct. App. 1998). (Emphasis added and internal citations omitted).

The map attached to and made a part of the Affidavit filed by MALC in Opposition to ISW's Motion to Dismiss clearly shows the location of the 66 foot strip of land owned by ISW and the tracks and roadway located within its boundaries. This map presented more than enough evidence for the trial court to determine that the easements sought by MALC would interfere with ISW's operation of its railroad facilities, which facilities, by definition, include the subject roadway. In addition, the Court now has before it the Affidavit of Daniel Lakemper, general counsel of ISW, which provides the Court even greater support for its decision. Accordingly, MALC's assertion that there was not enough evidence to support the Court's decision is without merit.

IV. Conclusion

MALC's state law claims are preempted by Federal Law, more specifically the ICCTA, and this Court's Order dismissing this action. Accordingly, the Defendant, ISW, prays that this Court deny MALC's Motion to Correct Errors.

Respectfully submitted,

 # 24326-64 f. CCW
CHRISTOPHER C. WISCHER IN # 0433-98
BAMBERGER, FOREMAN, OSWALD AND HAHN, LLP
P. O. Box 657
Evansville, IN 47704-0657
Telephone: (812) 425-1591
ATTORNEY FOR DEFENDANT, INDIANA
SOUTHWESTERN RAILWAY, CO.

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of April, 2004, mailed a true and correct copy of the above and foregoing by depositing the same in the United States Mail, First Class, to the following:

Marilyn R. Ratliff
Attorney at Law
123 NW Fourth St., Suite 304
Evansville, IN 47708

D. Andrew Wischer, #24326-64, for CCW
Christopher C. Wischer, #20433-98

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STATE OF INDIANA)
) IN THE VANDERBURGH SUPERIOR COURT
COUNTY OF VANDERBURGH)

MID-AMERICA LOCOMOTIVE &
CAR REPAIR, INC.,)

Plaintiff,)

vs.)

INDIANA SOUTHWESTERN
RAILWAY CO.,)

Defendant.)

) CAUSE NO. 82D03-0308-PL-3530

) JUDGE BOWERS

**AFFIDAVIT IN SUPPORT OF
MOTION TO DISMISS**

STATE OF ILLINOIS)
) ss
COUNTY OF PEORIA)

HAVING BEEN DULY SWORN, the undersigned DANIEL A. LaKEMPER, hereby deposes and states as follows:

1. My name is Daniel A. LaKemper. I am the General Counsel of Indiana Southwestern Railway Co. (ISW); I am over the age of eighteen (18); have personal knowledge of the facts contained herein, and would be competent to testify to the facts if called to do so.
2. ISW is a common carrier railroad that provides service pursuant to the authority granted it by the Surface Transportation Board in STB Finance Docket No. 33859 (served March 21, 2000).
3. I am informed and believe that the property over which the Plaintiff seeks to impose an easement is part of the right of way and yard facilities of the ISW.
4. ISW actively uses the track located on this property and physically interchanges railcars in interstate commerce on these tracks and in this yard, with CSX Transportation, Inc., another common carrier railroad (which also uses said tracks for purposes of interchange).
5. The right of way owned by ISW is approximately 66 feet wide for its entire length at the location is question, as shown by the Plaintiff's map (attached as Exhibit A to the Affidavit



by the Plaintiff), and is generally 33 feet on either side of the center of the main track.

6. The rail, ties, ballast, roadbed, and clearance of a track (collectively "roadbed") generally occupies a minimum of 15 feet on either side of the center of a track.

7. The road over which the easement is sought by the Plaintiff appears to be approximately 15 feet wide, as shown by Plaintiff's map, and for most of its length, does not occupy the outer 15 feet of the right of way. Thus, the easement would encroach upon the roadbed of ISW's main track.

8. ISW must maintain control of its entire right-of-way, including that portion over which the easement is subject, in order to assure for proper track maintenance, drainage, sight distance, security, and general safety.

9. In addition, these facilities are under the jurisdiction of the Federal Railroad Administration ("FRA"), and ISW is responsible to comply with FRA regulations governing safety and operations..

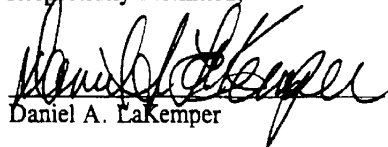
10. Further, ISW is in need of additional track space, and may need to build another track. The right of way has been dedicated for railroad purposes, including construction of additional tracks, if and when needed.

11. I am informed and believe that the Plaintiff is a non-railroad entity, which occupies a parcel of land adjacent to the ISW yard.


12. To permit the Plaintiff to acquire a permanent property right over a portion of the right of way would constitute a significant interference with interstate commerce, impede the present and future railroad use of the right of way, and present a safety and security hazard.

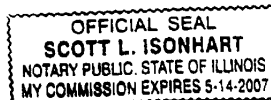
13. Further affiant sayeth not.

Respectfully submitted,


Daniel A. LaKemper

Subscribed and sworn to
before me this 16th. day
of March, 2004


Notary Public



Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 34599

PETITION OF MID-AMERICA LOCOMOTIVE AND CAR REPAIR, INC.
FOR DECLARATORY ORDER

VERIFIED STATEMENT OF BRUCE E. KNIGHT

My name is Bruce E. Knight, I am President of Mid-America Locomotive and Car Repair, Inc. (Mid-America) located at 1601 Allens Lane, Evansville, IN. I am authorized to make this Verified Statement to the Surface Transportation Board in support of Mid-America's Petition for Declaratory Order. Prior to my position with Mid-America, I was employed in the Evansville, Indiana, area by Indiana Hi-Rail Corporation for seven and one half years and by CSXT or its predecessor companies since 1968.

Mid-America, as its name implies, is in the business of repair and restoration of railroad locomotives and cars. Our company conducts its business utilizing the buildings and car repair facilities located adjacent to and immediately west of the Harwood Yard railroad facilities which are now operated by Ohio Valley Railroad Company. We began our operations in 1986 at this location and subsequently by a sales agreement dated June 29, 1996 purchased these repair facilities and the adjacent Harwood Yard from Evansville Terminal Company ("ETC"). Subsequently, ETC was acquired by Rail America which also acquired Mid-America's purchase agreement from ETC. On March 15, 2000, Indiana Southwestern Railway Co., a subsidiary of Pioneer Railcorp., purchased the 17.2 mile Evansville to Poseyville line from ETC which was then a

purchased the 17.2 mile Evansville to Poseyville line from ETC which was then a subsidiary of Rail America.

In 1996 Mid-America purchased its Harwood Yard properties from ETC, under a sales contract which had a balloon payment due after five years (in 2001). When Mid-America attempted to get financing for the balance of the purchase price, the fact that the property purchased had no direct access to Allen's Lane became an issue. The private access road to Allen's Lane that Mid-America had always used was on land owned by ISW (formally owned by ETC) and also on land owned by the Evansville Sewage Utility (Evansville Water Works Department) and Howell/McFadden/Kemper. Agreements for Mid-America's use of the private access road were reached with Evansville and with Howell/McFadden/Kemper Group but discussions with ISW were not productive.

Rail America continued to accept monthly payments under the balloon contract, even after the balloon date passed, but finally insisted on payment in full. Rail America filed a foreclosure complaint on June 20, 2002 and eventually the property was scheduled for a foreclosure sale. Mid-America continued to seek financing to avoid the sale and, eventually, just before the sale date, bank financing was obtained with which Mid-America and Harwood Properties were able to pay the judgment balance and cancel the sale. At that point, Rail America conveyed its interest in Harwood Yard by quit claim deed to Mid-America and Mid-America quit claimed its interest in Harwood Yard to Harwood Properties. In order to avoid difficulties in the event of future refinancing, Mid-America initiated a quiet title action to establish legal access via the subject roadway to Allen's Lane.

The access road passes between the trailer and scale house and is used not only by Mid-America and OVR employees and the occasional supplier, but is also used by ISW employees and by its suppliers and delivery trucks going to the scale house and office trailer.

Based on my personal knowledge and familiarity with the rail facilities in the vicinity of Harwood Yard, I can attest that the access road has been utilized by predecessor railroads and their business invitees to access the scale house and car repair facilities adjacent to Harwood Yard since prior to 1970. The road is clearly evident to anyone coming upon the property and is even depicted on the U.S. Geological Survey map for Evansville, Indiana a copy of which is attached to Exhibit C of the Mid-America petition. Similarly, the road can be easily seen on the U.S. Geological Survey aerial photographs attached at Exhibit C as well.

The access road adjacent to the ISW rail line provides the only means of ingress and egress at Mid-America's car repair facilities. It is currently utilized by myself and three or four of our employees who drive their cars to and from work over this roadway. Occasionally during the day, our company pick-up truck also utilizes this roadway in the course of normal business operations. The roadway may also occasionally be used by UPS or FedEx vehicles making pick-ups or deliveries in connection with our normal business activities. Thus, on a daily basis, the roadway is not utilized by more than six or seven vehicles per day and primarily in the morning and late afternoon. It is also used by two employees of OVR to access Harwood Yard. Since 1986, I have never known of a single incident in which use of the access road has unreasonably obstructed or impeded the use of the adjacent rail line by the various railroads who have owned it.

In its presentations to the Vandenberg County Superior Court, ISW failed to demonstrate that Mid-America's use of the access road interferes with its common carrier rail operations nor has ISW indicated that it intends to change its common carrier rail operations in a manner that would require exclusive use of the property over which the access road presently extends. Significantly, in the statement of facts presented by ISW to the Vandenberg County Superior Court (Exhibit D1), ISW represented that the "property" in question is part of ISW's interchange yard facility in Evansville, Indiana where ISW physically interchanges cars with CSX Transportation, Inc. While the ISW rail line adjacent to the access road is utilized for interchange purposes with CSXT, the property over which the access road extends is not presently occupied by ISW track facilities but is utilized solely for the purpose of road access as depicted on Exhibit C. ISW's attempt to characterize the property across which the access road extends as "operating" property is simply inaccurate and self-serving.

Moreover, the Affidavit submitted to the Court by Mr. LaKemper, General Counsel of ISW (Exhibit D3) confirms that ISW does not use the access road adjacent to its rail line for any operating purpose (i.e. track maintenance, drainage, sight distance, security or general safety) that would be impeded or subject to unreasonable interference by the access requirements of Mid-America. Mr. LaKemper also fails to explain how or why Mid-America's use of the access road could interfere with ISW's compliance with FRA safety and operating regulations or how or why ISW might chose to construct an additional track requiring 30 feet of road bed width on the access road which he states is presently only 15 feet wide. To do so, ISW would have to relocate its existing track 15 feet to the eastern edge of its right of way to accommodate an additional track on the

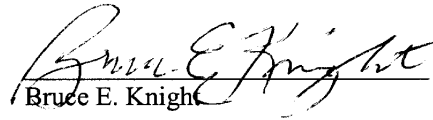
presently only 15 feet wide. To do so, ISW would have to relocate its existing track 15 feet to the eastern edge of its right of way to accommodate an additional track on the western side of its right of way presently used for the access road and relocate its scale house and office trailer. Based on my own personal knowledge of rail operations and traffic on the ISW line, there is no business or economic reason to support such new construction. Indeed, a washout caused by recent storms has taken part of the Evansville-Poseyville line north of Harwood Yard out of service and eliminated the only significant remaining traffic on this line.

Finally, Mid-America has explored alternative access from property owners lying immediately west of its plant facilities. That property is presently occupied by a large manufacturing concern which has refused to grant any access to Mid-America over its property to the Industrial Park roadway network which services that facility. The property line between Mid-America and this facility is blocked with a 6 foot chain link fence. Thus, Mid-America is solely dependent upon the subject roadway for access to and from the public highway network in Evansville, Indiana and we have asked the Vandenberg Superior Court to confirm our continued right to utilize the access road by means of the quiet title action.

VERIFICATION

I, Bruce E. Knight, verify under penalty of perjury state that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file the foregoing Verified Statement.

Executed on Oct 22, 2004.


Bruce E. Knight


CERTIFICATE OF SERVICE

I hereby certify that I have this 22 day of October, 2004, mailed a true and correct copy of the above and foregoing Petition For Declaratory Order to the following by regular, first-class mail, postage prepaid.

The Honorable Scott R. Bowers
Vanderburgh Superior Court
Civic Center Building
825 Sycamore Street
Evansville, IN 47708

Marilyn R. Ratliff, Esq.
123 N.W. Fourth Street, Suite 304
Evansville, IN 47708

Christopher C. Wischer, Esq.
Bamberger, Foreman, Oswald and Hahn, LLP
P. O. Box 657
Evansville, IN 47704-0657


Richard R. Wilson